Hatfield Trucking Service, Inc. *and* Randol Schoppman[1] *and* Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 533, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases 32-CA-2382 and 32-CA-2731

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 9 August 1981 Administrative Law Judge Michael D. Stevenson issued the attached decision. Charging Party Teamsters Local Union 533 (Teamsters) filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

The initial charge (Case 32-CA-2382) in this proceeding was filed by Randol Schoppman alleging that he was unlawfully discharged for filing safety complaints. The Region found insufficient evidence to support the charge and refused to issue a complaint. During the investigation, however, the Region found evidence that the Respondent had threatened employees with plant closure, loss of employment, and reprisals for supporting the Teamsters. The Respondent and the Region entered into a settlement agreement approved by the Regional Director 26 February 1980 requiring the posting of a notice specifically relating to the alleged 8(a)(1) threats. On 8 May 1980 the Teamsters filed a charge involving the discharge of Jeffrey Vinson, the 7 January 1980 layoff, and the previously settled allegations. On 31 October 1980 the Region withdrew approval of the settlement and issued the complaint in Case 32-CA-2731.

The judge found that the Respondent did not unlawfully discharge Jeffrey Vinson and that this allegation was the only one the settlement agreement did not cover;[4] that the layoff of several employees 7 January 1980 was a readily discoverable allegation covered by the settlement; and that the allegations that the Respondent unlawfully discharged Randol Schoppman and that the Respondent variously threatened employees were both covered by the settlement. Accordingly, the judge reinstated the settlement agreement and dismissed the complaint in its entirety. We agree.

We agree with the judge that the settlement agreement was improperly set aside. As settlements are not to be treated lightly, the Board will not set aside a settlement agreement unless there is a breach of the agreement or a subsequent related violation of the Act. *Henry I. Siegel Co.*, 143 NLRB 386 (1963). Here there is no contention that the Respondent breached the settlement and, as discussed above, there was no related postsettlement violation of the Act. Accordingly, we shall reinstate the settlement.

A related issue is whether the layoff allegation is disposed of by the settlement agreement. Presettlement conduct is barred from subsequent litigation unless the alleged violations were not known to the General Counsel, or were not readily discoverable through investigation, or were specifically reserved from the settlement. *Hollywood Roosevelt Hotel*, 235 NLRB 1397 (1978); *Laminite Plastics Mfg. Corp.*, 238 NLRB 1234 (1978). Compare *Laminite Plastics Mfg. Corp.*, 238 NLRB 888 (1978), which is specifically distinguished in 238 NLRB 1234. The judge concluded that the General Counsel was barred from litigating the presettlement layoff because it was or should have been discovered through a proper investigation. We agree. As discussed below, we find that no special circumstances exist here warranting consideration of the presettlement conduct.

The Respondent's employees began their organizational drive at the Reno, Nevada terminal in mid-December 1979. On Friday, 4 January 1980, Terminal Manager John Norman learned of the union activity and interrogated a clerical employee about who had signed cards. The clerical gave no details but said (truthfully) that a majority had. Norman then called Company President John Hatfield in Sacramento, California, and after the call told the

[1] Schoppman's name was added during the hearing.

[2] Charging Party Teamsters has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] As we are adopting the judge's conclusions that the settlement agreement should be reinstated and the complaint dismissed in its entirety, we find it unnecessary to, and do not, pass on his alternate findings that the Respondent lawfully discharged Randol Schoppman and unlawfully laid off several employees.

[4] The only postsettlement violation alleged is that Jeffrey Vinson was discharged because he appeared in the court building where a representation hearing was taking place. Vinson, who had been laid off 7 January 1980, had been calling the Respondent weekly to see if there was work available. On 7 February he was in the courthouse and talked briefly to the Respondent's attorney. Vinson's testimony that he was told the next week not to call anymore because he had been at the hearing was discredited by the judge. Accordingly, the judge dismissed the allegation on the merits. We agree.

clerical that Hatfield intended to close down the terminal on Monday. Later that day Norman told a meeting of employees that Hatfield would close the business before he would go union because he could not afford union scale. These threats and the interrogation were the subject of the settlement. The next Monday, 7 January, Hatfield came to the terminal and laid off six employees. The layoff is alleged to have violated the Act. The Respondent contends that the layoff was made necessary by its impending move to a smaller terminal.

The judge concluded that the General Counsel was barred from litigating the presettlement layoff because it was or should have been discovered through a proper investigation. The judge cited the short timespan (from Friday to Monday) between the subject of the settlement (the threats) and the layoff and the closely related nature of the threats of plant closure and job loss to the layoff. In addition, there is no indication that the evidence as to this issue was unavailable to the Regional Office during its investigation of the charge in Case 32-CA-2382.[5]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

IT IS FURTHER ORDERED that the settlement agreement in Case 32-CA-2382 approved 26 February 1980 is reinstated.

[5] The record does not show why the General Counsel did not pursue the matter prior to settlement, and the General Counsel did not file a brief with the Board.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENS, Administrative Law Judge. This case was tried before me at Reno, Nevada, on April 21 and 22, 1981,[1] pursuant to an order withdrawing approval of settlement agreement, order consolidating cases, consolidated complaint and notice of hearing issued by the Regional Director for the National Labor Relations Board for Region 32 on October 31, and which is based on a charge filed by Randol Schoppman,[2] an individual (Case 32-CA-2382), and Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 533, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Case 32-CA-2731)[3] herein called Schoppman and Union, respectively, on January 2 (Case 32-CA-2382) and on May 9 and October 27, original and first amended charge (Case 32-CA-2731).[4] The complaint alleges that Hatfield Trucking Service, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act).

Issues

1. Whether Respondent violated Section 8(a)(1) and (4) of the Act by discharging Steven Vinson because of his attendance at a Board hearing.

2. Whether the settlement agreement was properly set aside and, if so, whether Respondent violated the Act.

(a) By terminating Schoppman because it suspected him of filing a safety complaint with an appropriate state agency.

(b) By interrogating employees about union activities and by threatening them with business closure and discharge because of their union activities.

(c) By laying off several employees because of their union activities.

3. If Respondent committed any or all of the above violations of the Act, whether a bargaining order should issue.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation engaged in the interstate transportation of freight business and having an office and place of business located in Stockton and Sacramento, California, and Sparks, Nevada. It further admits that during the past year, in the course and conduct of its business, it has shipped goods and materials valued in excess of $50,000 directly outside the State of California. Accordingly, it admits and I find that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 533, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates herein refer to 1980 unless otherwise indicated.

[2] Schoppman's name was added to the caption of the case by motion of the General Counsel.

[3] The complaint is amended consistent with the motion of the General Counsel referred to above.

[4] On February 13, Respondent entered into a settlement agreement of Case 32-CA-2382; on February 26, the settlement agreement was approved by the Regional Director; on October 31, the Regional Director entered an order withdrawing approval of said agreement alleging that Respondent committed subsequent violations of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent maintains truck terminal facilities in Sacramento and Stockton, California, and Sparks, Nevada. President of the Company is John Hatfield who spends most of his time at company headquarters in Sacramento. Terminal manager at Sparks, Nevada, near Reno, is John Norman. Both men were witnesses at hearing and explained that Respondent moved to its present location in Sparks in mid-January. Prior to the move, Respondent rented facilities in Reno. It moved after the lessor, Sierra Pacific Power Company, sent a "Notice of Termination" to Respondent, dated December 18, 1979. The 30-day notice required Respondent to vacate its current premises not later than January 30. (R. Exh. 2.) Lessor's manager of land and water resources, Robert Firth, testified that the December 18 notice was the first contact between the lessor and Respondent with respect to the lease termination. Lessor terminated the lease because it needed more space. Respondent had leased the premises from April 1, 1978 (R. Exh. 2), and had subleased part of the premises to another concern. This independent business also vacated the premises in January.

Prior to its move to new quarters in mid-January, Respondent laid off six employees because of a reduced volume of business which was allegedly caused by the move to smaller quarters. The employees are Steve Perry, Ron Bessette, Dale Fletcher, Steve George, Nancy Ross, and Jeff Vinson. Evidence in the case suggested that Respondent had been losing money prior to the notice to vacate premises. In addition, prior to the notice some employees saw sketches of a new facility which Respondent was planning to construct in the Reno-Sparks area, or at least was considering. However, this project was abandoned. Contemporaneous with the mid-December notice to vacate was union activity which appears to have begun after the discharge of Schoppman.

Randol Schoppman, a long-distance driver, was discharged by Norman on or about December 13, 1979. Schoppman had been hired by Norman about 2 months before his discharge. His routine assignment was to drive between 11 p.m. and 8 a.m. an empty tractor-trailer to Respondent's facility in Sacramento where the empty trailer would be exchanged for a fully loaded trailer which Schoppman would drive back to Reno. Shortly before his discharge, Schoppman was suspected by Terminal Manager John Norman of filing an anonymous complaint with the State of Nevada OSHA agency (G.C. Exh. 4). Norman received a copy of the complaint through the mail in late November. Ross, then employed by Respondent as a secretary, testified that Norman asked her who filed the complaint; she denied knowing who did and further denied that either she or another secretary, Pam Mitchell, had filed it. She further testified that she told Norman that, if she had filed it, she would have signed it and she was sorry she had not thought of it herself. In early December 1979, a Nevada OSHA inspector arrived at Respondent's premises. Steven George, a witness at hearing and an alleged discriminatee, testified that he asked Norman what was going on and Norman responded that someone had filed an OSHA complaint and the inspector was checking out the terminal. Later the same day, George again talked to Norman. This time Norman stated that he had three suspects in mind as to who filed the complaint—he named Mitchell, Ross, or Schoppman—and if he found out who it was the person would be gone. To all of this George disclaimed any knowledge.

In his testimony, Norman did not deny the conversations attributed to him above. Specifically he admitted talking to George about an OSHA complaint, and testified that he was upset that the complainant did not first come to discuss the matter with him before going to the state agency. Thus, I credit the testimony of Ross and George above.

Like Ross, Schoppman was also asked by Norman in early December whether he knew anything about the OSHA complaint. At that time he denied any knowledge of the matter. On December 10, Schoppman began his normal run to Sacramento driving his normal tractor no. 240. The first segment of his work was completed without incident. On the return trip somewhere near the California-Nevada border, Schoppman testified that he heard a clattering noise coming from under his seat. His gauges indicated that he was losing air pressure and all agree that the air compressor had blown. One of Respondent's own mechanics testified that this problem can occur at any time without warning and in a minor and inexpensive repair job.

Schoppman further testified that he stopped at the first opportunity about 6–7 miles from when the first clattering occurred. He further testified that he was on a downgrade at the time of the first noise and was unable to stop the vehicle safely before the point he did. He denied that any red light ever went on indicating rapidly falling oil pressure. After stopping the vehicle, Schoppman received a ride to a nearby town where, according to his testimony, he called Norman at home to tell him what happened and what he thought was wrong with the tractor. Then, according to Schoppman, Norman pleaded lack of experience in handling truck breakdowns and he asked Schoppman to call a tow truck which Schoppman did. When he called Norman back, Schoppman told him a tow truck was on the way, but that he could not stay with the disabled tractor as requested by Norman because it was zero degrees out. Schoppman stated that he was going to go home and he did, having been picked up by Ross with whom he was then living.

Norman recalls a slightly different version of events. While agreeing that he received Schoppman's call at his home about 6 a.m., Norman testified that Schoppman reported that the truck had a blown compressor and asked what did the Company wish to do about the disabled truck. Schoppman further reported that he had his girl friend (Ross) with him and he was going home. Norman testified he called the tow truck and immediately went to the disabled truck where he found the truck unattended, parked improperly too close to the road, without flares or flashers, and covered with oil.

The next day Schoppman called for information on his assignment that night. Both he and Norman agree that Norman asked him to drive tractor 232 normally used by

a day driver. Schoppman refused to use the truck as he believed the headlights to be inoperative. According to Norman, it was the tail lights that had previously not been working, but Norman himself had fixed them. He did not tell this to Schoppman.

The next day Norman learned that the truck motor had been blown up and damaged in excess of several thousand dollars. According to Norman, Hatfield, and one of their current employees who testified at hearing as an expert witness on motors, the damage to the truck resulted from Schoppman driving too long a distance after he had notice of the broken air compressor. Indeed, Steve Perry, who signed a union authorization card (G.C. Exh. 13), and who is listed in paragraph 10 of the complaint as an alleged discriminatee, testified for Respondent on the matter here in issue. According to Perry, he had a conversation with Schoppman sometime after the truck incident and after Schoppman was terminated, in which Schoppman stated he drove the truck about 17 miles after the oil pressure had become inadequate for the operation of the vehicle. In crediting this testimony of Perry, I note several factors: First, while Schoppman was called in rebuttal, he never denied the conversation with Perry; second, Perry was, in a sense, testifying against his own interests here even though Schoppman's case is severable from that involving Perry; third, Perry's testimony is consistent with that of Norman, Hatfield, and Jim Cain, Respondent's mechanic and expert witness. Accordingly, I find in spite of his many years of experience, his good references, and the lack of a motive to account for what he did, that Schoppman negligently caused serious damage to one of Respondent's trucks and, further, that Schoppman's account of the incident involving the truck was untruthful.[5]

After Schoppman was terminated, Ross and others began to organize a union at Respondent's premises. Ross called Vinson on December 14, 1979, and left a message with his roommate relative to a union meeting the next day, a Saturday. The roommate wrote down the time and location of the union meeting together with Ross' further admonition, "Don't tell Bennett & Gonderman"—two current employees of Respondent. On or about Friday, January 4, Norman was having lunch at Vinson's home when he observed Ross' message which Vinson's roommate had written on a note pad. When Norman asked Vinson about the message, the latter denied any knowledge of its meaning.[6]

After returning to work that day or shortly thereafter, Norman interrogated Ross about the note and other union activities. He asked who had signed union cards and who had attended the meeting. She refused to answer specifically, but told Norman that a majority of employees had signed cards. In Ross' presence, Norman then called John Hatfield, company president, in Sacramento. Ross did not hear the conversation, but Norman reported to her that Hatfield intended to close down the facility on Monday. Ross called Hatfield back and he said that Norman reported employees were going to walk out so he was going to close the facility down. When Ross denied a walkout was planned, Hatfield asked if it was true about the union activity. Ross confirmed this and asked Hatfield to come to Reno to talk to employees about job grievances as the union activity did not necessarily mean they would be going union. Hatfield agreed to this.

Later, on Friday, January 4, Norman held a meeting with Respondent's employees. There, Norman stated that Hatfield would close down the business before he would go union as he could not afford to pay union scale. He himself would quit before he would ever go union. Norman also told employees they were being used by Schoppman who was instigating union activity. Moreover, according to Norman, no one would receive promised raises because Schoppman had blown up a truck which cost a great deal of money for repairs.[7]

On Monday, January 7, Hatfield came to Reno and several employees were laid off. One of the reasons given by Hatfield at the time was due to an increased level of employee theft. The primary reason, both as stated by Hatfield at the time and as presented by Respondent at hearing, was a forced move to smaller quarters.

Those who signed union cards were all of Respondent's employees laid off plus Schoppman terminated before union activity began, plus two other employees not laid off, John Gabriel and Anton Bennett. The names of the employees and the dates of the cards follow:

Nancy Ross, 12/15/79 (G.C. Exh. 3)
Steven George, 12/17/79 (G.C. Exh. 5)
Ronald Bessette Jr. 12/15/79 (G.C. Exh. 6)
Randol Schoppman, 12/15/79 (G.C. Exh. 7)
John Gabriel, 12/17/79 (G.C. Exh. 10)
Jeffrey Vinson, 12/18/79 (G.C. Exh. 11)
Dale Fletcher, 12/15/79 (G.C. Exh. 12)
Steven Perry, 12/15/79 (G.C. Exh. 13)
Anton Bennett, 12/15/79 (G.C. Exh. 14)[8]

[5] In light of my findings below regarding the settlement agreement, I will not make specific findings regarding Schoppman. However, were I to analyze this case in terms of *Wright Line*, 251 NLRB 1083 (1980), I would find that the General Counsel has proven a prima facie case that Schoppman's protected activity, i.e., apparent filing of the OSHA complaint, Respondent's belief that Schoppman may have done so, or Schoppman's belief that the truck assigned to him was unsafe, was a factor in Schoppman's discharge. See *Anco Insulations*, 247 NLRB 612 (1980). I would also find that Respondent has proven that Schoppman would have been fired even in the absence of the protected activity. I would recommend dismissal of this allegation on its merits.

[6] The record is unclear if this was the first knowledge Norman had regarding union activity. Ross said it was, but Steve George testified that, about January 2 or 3, he was cleaning a company truck off at a gas station near Respondent's premises when Norman asked him, "Have you heard anything about the union or has the union contacted you at all?"

[7] The threats of job closure and interrogation about union activities apparent in the above description of Norman's statements were the subject of the settlement agreement approved by the Regional Director on February 26.

[8] Of this group, George admitted that he was not laid off on January 7, but that on January 11 he approached Norman and volunteered to be laid off in place of someone else with less seniority, because he was single and could afford the loss of the job better than someone else. In addition, George described his job as foreman. Since his possible status as a statutory supervisor was never litigated, I make no finding on that issue, either as it affects the bargaining unit or the validity of his layoff.

The appropriate unit would include the above list of employees, less Schoppman fired on or about December 13 and less Ross who was a clerical. It would also include driver Ray Barker hired on or about December 17, 1979, allegedly to replace Schoppman, Wade Gonderman, a local driver, and Les Wong, a part-time driver.[9]

One of the employees laid off was Vinson, a local driver. In order to comply with state unemployment regulations, Vinson arranged with Norman to call Respondent weekly. This arrangement continued for about 3 to 4 weeks, each time Norman telling Vinson there was no work available. Then, Vinson attended a representation hearing in the Federal courthouse where he encountered Respondent's current attorney, Shanley. A brief conversation ensued and, the next week when Vinson called Norman for the routine work check, the resulting conversation is sharply disputed. All agree, however, that Vinson made no further calls to Norman. I will return to this issue below.

B. *Analysis and Conclusions*

1. Was Jeff Vinson terminated in violation of Section 8(a)(1) and (4) of the Act.[10]

After his layoff on January 7, Vinson called Norman about once a week to determine whether any work was available. After a few such calls without incident, Vinson attended a representation hearing at the Federal building in Reno on or about February 7. While there, he encountered Shanley, Respondent's attorney then as now. The momentary meeting occurred in an elevator with neither person identifying himself to the other. Steven George, another alleged discriminatee, was also in the elevator, according to Vinson. Then, allegedly, Vinson said to Shanley, "What's our chances of winning?" but the latter made no reply. The next time Vinson called, Norman said not to call anymore and that Vinson could not use Respondent as an employment reference in the future, all because Vinson was at the hearing.

I begin with the fact that an employee has a right protected by Section 8(a)(1) and (4) of the Act to attend a Board hearing or otherwise to participate in various stages of the Board's processes.[11] In this case, Vinson did not testify or even enter the courtroom. However, his failure to testify does not take him outside the protection of the Act.[12]

In this case, however, I cannot credit the testimony of Vinson as to his subsequent conversation with Norman as described above.[13] First, there was no evidence that Shanley knew Vinson or that Shanley somehow reported the conversation to Norman or Hatfield.[14] I am unwilling to speculate on this and, under the circumstances, I find no duty on Shanley to take the stand to dispel the inference which the General Counsel was attempting to create.[15] Next, Vinson was not an impressive witness. His testimony, particularly at the crucial parts, was not forthright; it was the product of leading questions. (Compare R. Tr. 162, 163.)

Finally, I note the testimony of Norman and one other employee on this point. Norman denied the posthearing telephone conversation as reported by Vinson; according to Norman, he spoke by telephone to Vinson after the hearing and said that he could not do anything for him anymore, that there was not work then or in the future, and that all the jobs were terminated. Norman's weekly conversations could be construed as untruthfully promising people future employment. When Vinson called, Norman asked an employee named Wade Gonderman to be a witness to one side of the telephone conversation with Vinson. At hearing, Gonderman generally corroborated Norman's account of the telephone call. In evaluating the weakness of the General Counsel's evidence and the strength of the Respondent's denials, I cannot credit testimony of Vinson on this point and I will recommend that this allegation be dismissed.[16]

2. What is the effect of Respondent having committed no violations of the Act subsequent to approval of a settlement agreement, on the agreement itself, and on the other preagreement violations alleged in the complaint.

(a) *The settlement agreement*[17]

It seems clear to me, in light of my ruling above, that the Regional Director should not have withdrawn ap-

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[9] Thus, it appears that a clear majority of the bargaining unit signed union authorization cards. As to the hiring of Barker, I discredit Norman's testimony that he was hired because no one else was qualified to replace Schoppman. The parties stipulated that seven of their employees all had class 1 licenses authorizing them to drive the type of tractor-trailer driven by Schoppman. Norman himself, one of the seven, normally terminal manager, made the trip several times after Schoppman's termination. Although the layoffs on January 7 were allegedly made by seniority, Barker, the least senior employee, was not laid off.

[10] I have reversed the chronological order of the issues here since the Regional Director withdrew approval of the settlement agreement based only on the alleged subsequent violation involving Vinson. (G.C. Br. 8.) If this violation falls, so too will the Regional Director's disapproval of the settlement agreement.

[11] *Earringhouse Imports*, 227 NLRB 1107, 1108 (1977).

[12] *Earringhouse Imports*, supra at 1108 fn. 6.

[13] Because of my resolution of the credibility issue, it is unnecessary to decide whether, in mid-to late February, Vinson was still an "employee" of Respondent. However, it should be noted that Vinson is alleged in par. 10 of the complaint to have been laid off in violation of Sec. 8(a)(3) and (1) of the Act, as of January 7.

[14] In this respect, the General Counsel should have notified Shanley in advance that he, Shanley, would be injected into the case in a personal way and might therefore have to become a witness at hearing.

[15] Since Vinson made no reference to talking to nor even seeing Norman or Hatfield at the representation hearing, the attempted inference is that Shanley reported Vinson's presence to his clients.

[16] Two additional points should be mentioned: First, in deciding whether the General Counsel has proven a violation regarding Vinson, I have considered the evidence of Respondent's presettlement conduct which is admissible and relevant to show Respondent's motive or object in connection with its postsettlement conduct alleged to be an unfair labor practice. *Sheet Metal Workers Local 80 (Sise Heating Co.)*, 236 NLRB 41, 42 fn. 3 (1978). Although this presettlement conduct shows a high degree of union animus, it is not sufficient to prove a violation regarding Vinson. Second, I am not surprised that Norman was guarded in his conversation with Vinson and asked Gonderman to be a witness to it. Not only was Norman receiving legal advice by then, but also Schoppman had filed an unfair labor practice charge on January 2, and Respondent had entered into or was about to enter into a settlement agreement of other matters uncovered. With this background to the telephone conversation, I find it preposterous that Norman would, in effect, admit to Vinson that Respondent had committed a serious violation of the Act.

[17] For a comprehensive review of Board and court decisions relative to this issue, see Annotation, Settlement of Unfair Labor Practice Cases, 14 ALR Fed. 25 (1973), and particularly sec. 64, at 131.

proval for the settlement agreement on October 31. Accordingly, I will recommend that the Board order reinstatement of the settlement agreement and I will further recommend that paragraph 6 of the complaint be dismissed because this conduct was the subject of the settlement agreement. (G.C. Br. 8, fn. 7.)[18]

(b) *The other preagreement violations alleged in the complaint*

The General Counsel litigated at hearing the discharge of Schoppman and the later layoffs of six of Respondent's employees. He also seeks a bargaining order. Outside of a brief footnote (fn. 7), the General Counsel does not discuss the settlement agreement nor how it may affect his case. For its part, Respondent contends (Br. 2–3) that the settlement agreement should not have been vacated, but does not discuss the result of a reinstatement of this settlement agreement on remaining allegations of the complaint. In short, neither side has been helpful on a very important threshhold issue.[19]

I begin the discussion with a recent statement of Board law:

> . . . presettlement conduct is barred from unfair labor practice litigation by a subsequent valid settlement agreement, except to the extent that unlawful conduct was unknown to the General Counsel or not readily discoverable through investigation or reserved from the settlement by the mutual understanding of the parties, unless a respondent fails to comply with the settlement agreement.[20]

Schoppman filed the charge in Case 32–CA–2382 on January 2 and alleged only that he himself had been unlawfully terminated. The record shows that Schoppman was terminated on or about December 13, 1979. The settlement agreement did not address Schoppman's allegations but, rather, dealt with antiunion threats and interrogations which occurred subsequent to Schoppman's discharge. Then, on May 9, the Union filed a charge in Case 32–CA–2731 which again alleged Schoppman's unlawful discharge, and the unlawful layoff of several employees on or about January 7, an unlawful discrimination against Vinson on or about February 12, and an unlawful refusal-to-bargain charge. The discharge of Schoppman and the layoff of several other employees are all presettlement conduct which is barred from litigation by the settlement agreement which I have found above has not been breached.[21] Further, while not argued by the General Counsel, I look to the exceptions to the general rule as set forth above in *B & W Construction Co.*, to see whether any apply to the instant case.

Specifically, it must be determined whether the presettlement conduct at issue involving Schoppman and the six laid-off employees was unknown to the General Counsel or not readily discoverable through investigation. To show that the General Counsel either knew or through diligent investigation should have known, witness these facts. On January 2, Schoppman charged that he was unlawfully discharged. The subsequent investigation uncovered, apparently, not proof of Schoppman's charge, but rather, the unlawful threats which occurred primarily on January 4. Just 3 days later the alleged unlawful layoffs occurred. Respondent did not approve the settlement agreement until some 5 weeks after that on February 13. The Regional Director approved it about 2 weeks after that on February 26.[22] Thus, the short time span between the settlement agreement conduct and the subsequent layoffs, together with the closely related nature of the charges (i.e., the layoffs immediately followed the threats of job loss), convince me that the General Counsel is barred from litigating the presettlement conduct here. In sum, the General Counsel was duty bound to investigate all matters encompassed by the charge and, had he done so, the alleged unlawful layoffs would have been uncovered.[23]

Moreover, as was true in *Jefferson Chemical Co.*, supra, Charging Party is not totally without fault here. The Union must have known of the alleged unlawful layoffs shortly after they occurred, or, at least, before the settlement agreement was approved. Yet, it waited until May 9 to file its charge in Case 32–CA–2731. Based on all the evidence of record, it is clear that neither one of these two exceptions apply here.

Nor can I find that the next exception applies—i.e., "reserved from the settlement by the mutual understanding of the parties." It is true the agreement contains the following language:

> This Agreement resolves only Case 32–CA–2382 and is not intended to resolve, dispose of, or preclude litigation on any other matter pending or otherwise before the Board.

So far as I can tell, there was no other matter "pending or otherwise before the Board" when the Regional Director approved the Agreement. Accordingly, this exception does not apply. Since I have previously determined that no subsequent violation of the settlement agreement occurred, I make no findings on the presettlement conduct alleged to have violated the Act.[24] In

[18] See *Herald Life Insurance Co.*, 227 NLRB 1546 (1977).

[19] I find that Respondent adequately preserved its position, however poorly, and that no claim of waiver can properly be found.

[20] *Teamsters Local 215 (B & W Construction Co.)*, 251 NLRB 1234 (1980); see also *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978).

[21] Compare *Interstate Paper Supply Co.*, 251 NLRB 1423, 1424 fn. 9 (1980). I note that the two charges in issue here were filed by two different charging parties: Schoppman and the Union. However, that fact is not sufficient to change the ruling barring litigation and findings of the presettlement conduct.

[22] Apparently Schoppman, though Charging Party, did not approve the agreement. Nevertheless, there is no claim the agreement was not valid for that reason.

[23] *Laminite Plastics Mfg. Corp.*, 238 NLRB 1234 (1978); cf. *Jefferson Chemical Co.*, 200 NLRB 992, fn. 3 (1972).

[24] Elsewhere in this opinion I have indicated my view of Schoppman's case on the merits. I have further attempted to resolve key credibility issues. Now I briefly state my view of the six employees alleged to have been laid off in violation of the Act. First, I find that *Wright Line*, supra, 251 NLRB 1083 (1980), does not apply as I find that the General Counsel has proven not only a prima facie case of unlawful layoffs, but that Respondent's justification was entirely pretextual. Thus, I find that Respondent expected to move prior to receipt of the notice to vacate. Pre-

Continued

sum, I recommend that the settlement agreement be reinstated and that the complaint be dismissed in its entirety.[25]

liminary plans and sketches of a new building were prepared and shown to employees. Schoppman and Ross were once asked to check out possible new quarters. Then, coincident with Respondent's discovery of union activities, it received the notice to vacate premises. At this point, I am convinced that Respondent abandoned its plans to construct new quarters purely to spite the Union. Further, on January 4, when Norman interrogated employees about union activities and threatened to close the business, he made no mention at all about an imminent move to smaller quarters and possible layoffs for that reason. In addition, the retention of Barker, the most junior member of the unit, while laying off more senior qualified drivers, cannot be ignored. See *NLRB v. American Casting Service*, 365 F.2d 168, 172 (7th Cir. 1966). Thus, with the caveat expressed about George above—whether he voluntarily quit his job, or whether he is a statutory supervisor—I would find on the merits that Respondent laid off the employees in violation of the Act and that the employees are entitled to reinstatement and backpay. I would also find that a bargaining order is warranted under the facts and circumstances of this case. These alternative findings are made in the event the Board determines I erred in application of *B & W Construction Co., Hollywood Roosevelt Hotel Co.*, supra, and other authorities to the instant case.

[25] As a further basis for my ruling in this case, I rely on *Indio Community Hospital*, 225 NLRB 129 (1976), and *Fine Organics, Inc.*, 214 NLRB 158, 160 fn. 5 (1974).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(1) and (4) of the Act by discharging Vinson.
4. The parties hereto entered into a settlement agreement which was approved on February 26, 1980, and Respondent has not failed to comply with it and has not engaged in any postsettlement unfair labor practices.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The settlement agreement approved on February 26, 1980, is reinstated and the complaint is dismissed in its entirety.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.